

MEMORANDUM

TO: Foundational Provision Subcommittee Members

FROM: Jim Tomkovicz, Chair

RE: Attempt, Solicitation, Conspiracy

DATE: September 15, 2008

I. INTRODUCTION

The topics treated here are the three “general” inchoate crimes: attempt, solicitation, and conspiracy to commit other offenses. The primary issues are how to define those offenses in terms of mens rea/culpability and actus reus/conduct and whether to recognize a “renunciation” defense. More specific issues arise with respect to each of these inchoate offenses.

II. ATTEMPT

A. Issues in Attempt Law

The law of attempt has not always been well developed (and such is still the case under Iowa law). One significant question is how to define the act that is required before a person can be liable—in other words how much and what kind of conduct suffices. Another significant question is what to require in terms of culpability for the elements of the crime attempted—that is, the mens rea needed for the act/conduct, any result element of the crime attempted, and any circumstance element of the crime attempted. The final important issue is whether to recognize a renunciation defense for an accused who has satisfied the act and mental state requirements, and, if so, how to define that defense.

B. The Model Penal Code Provision

Section 5.01 of the Model Penal Code is the ALI’s very lengthy effort to respond to all of these questions. It has four subsections:

Subsection (1) DEFINES ATTEMPT, specifying the mens rea and actus reus required. It is somewhat complicated, containing three alternative definitions to cover all the ways in which a person might fail to complete a crime but be properly held liable for an attempt. This subsection

- ▶ in (1), specifies that for any *circumstance element* of an attempted crime, the culpability required is the same as that required by the completed offense—no more and no less. This provision applies to all three types of attempt in (a), (b), and (c)
- ▶ in (1)(a), addresses crimes that *do not contain a result element* and is meant to apply to situations where the actor has done everything he or she intends to do but fails to

complete the crime because some circumstance does not exist; it requires *purpose* for the conduct, and eliminates the “impossibility” defense by stating that the actor is liable if he believed the missing circumstance existed. (Examples: A person who has sex with a person he believes is fifteen, but who is actually seventeen, has attempted to have sex with a person under sixteen under this provision. A person who takes property with the belief it belongs to another person, when in fact it is his own, has attempted theft under this provision.)

- ▶ in (1)(b), addresses crimes that *do contain a result element* and is meant to apply to situations where the actor has done everything he or she intends to do but fails for some reason to cause the result; it implicitly requires purpose for the conduct and explicitly requires purpose or belief with respect to the result element; and it implicitly rejects the impossibility defense as well by the way it is phrased. (Examples: A person who shoots into a closet, with the purpose of killing someone inside the closet (or the belief he will do so), is guilty of attempted murder even if the person is not in the closet or is already dead.)

- ▶ in (1)(c), addresses all types of crimes and is meant to apply to situations where the actor still has more to do to complete the crime; it requires purpose regarding conduct, states “a substantial step” is sufficient conduct, and specifically eliminates the impossibility defense. (Examples: A person who takes a person who is fifteen to an apartment to have sex and is intercepted by the police before completing the act is guilty of attempt to have sex with a person under sixteen. This is true even if the victim is seventeen if the accused believes the victim is fifteen. In fact, a substantial step has probably been committed well before they arrive at the apartment.)

Subsection (2) DEFINES what a SUBSTANTIAL STEP is for purposes of (1)(c)

- ▶ First, it adds that conduct cannot be considered a “substantial step” unless it strongly corroborates (i.e. provides strong confirming evidence of) the actor’s criminal purpose.
- ▶ Second, it lists seven different types of acts that *can be legally sufficient* to constitute substantial steps under (1)(c).

Subsection (3) PROVIDES liability for an accomplice when the crime aided is not committed or attempted

- ▶ This brief subsection is intended to plug something of a “gap” in the law. It provides that if a person does what it takes to be an accomplice to another’s crime with the requisite mens rea, but the principal does not commit or attempt the crime, then the person who would have been an accomplice is guilty of an attempt to commit the crime. Traditionally, such a person would have been “lucky” and escaped all liability.

Subsection (4) DEFINES a RENUNCIATION DEFENSE to attempt liability

- ▶ This subsection both recognizes and defines a defense of renunciation for a person who has committed an attempt under (1)(b) or (1)(c), but has voluntary and completely

renounced his/her criminal purpose. It defines what is meant by "voluntary" and "complete."

C. State Law

According to my research assistants' surveys, 29 states have MPC-like attempt statutes, 3 have statutes that have some elements that are similar to the MPC, and 15 have statutes that are not like the MPC. For statutes that are not like the MPC, see the website under "attempt." (<http://iowacriminalcode.googlepages.com/17.htm>.) Only 3 states (including Iowa) have no general attempt statutes. Some state provisions include grading schemes within the attempt provision (see website). (Note: As a general rule, the MPC, in section 5.05, grades attempts to commit all but the most serious crimes *at the same level* as the crime attempted. The most serious level is reduced one grade.)

D. Iowa Law

- ◆ Iowa law has no general attempt provision. Attempts are specifically prohibited for some crimes, but if the crime does not specifically include a prohibition of attempt, then an attempt to commit it is not an offense.
- ◆ For attempts that are criminal, the case law requires an *intent* to do an act or bring about certain consequences which would amount to a crime. *State v. Spies*, 672 N.W.2d 7982 (2004). Attempted murder requires a *specific intent* to cause death. *State v. Young*, 686 N.W.2d 182 (2004).
- ◆ As for the conduct required, the requirement is phrased in more than one way. The state must prove an act in furtherance of the accused's intent that goes beyond mere preparation (*State v. Spies*, 672 N.W.2d 7982 (2004)); slight acts in furtherance of the crime that render voluntary termination improbable, (*Fryer v. State*, 325 N.W.2d 400 (1982)); or any act which the person expects to set in motion a force that will cause the crime. (*State v. Young*, 686 N.W.2d 182 (2004).)
- ◆ No mention of a renunciation defense was found in the Iowa cases.

E. Questions/Issues

The most basic question that the subcommittee must address is whether to recommend adoption of a general attempt provision. If the answer is affirmative, the subcommittee should address the following specific issues:

1. What **conduct/actus reus** should be sufficient for incomplete attempts?
2. How specifically should the required **culpability/mens rea** for attempts be defined?
3. Should a provision for attempt liability for "**failed accomplices**" be included?
4. Should a **renunciation defense** be recognized, and, if so, how should it be defined?
5. Should a **grading scheme** be included in the attempt provision? If so, how should attempts be graded?

F. Recommendations

The chair would recommend:

1. Proposal of a general attempt provision and elimination of attempt from specific crimes.
2. Proposal of the MPC "substantial step" standard for the conduct required, including the requirement that the conduct, to be a substantial step, must "strongly corroborate" the actor's criminal purpose.
3. Proposal of the same culpabilities for attempts as those provided in the MPC: purpose for conduct; purpose or belief for results; same as completed crime for circumstances. (But the chair would recommend a simpler, clearer specification of culpabilities than that included in the MPC.)
4. Clear elimination of any "impossibility" defense. (The chair would recommend a more direct elimination like those found in other state statutes.)
5. Proposal of a renunciation defense modeled on the MPC (and like the one found in Iowa Code 705.2 for "Solicitation").

The chair believes that a grading scheme should probably be included, but does not take a position on the grading of attempts that should be proposed.

The chair does not take a position on whether the subcommittee should propose a subsection like 5.01(3), providing attempt liability for "failed accomplices."

III. SOLICITATION

A. Issues in Solicitation Law

There is an initial question of whether to criminalize solicitation of other offenses. Iowa law already has a general solicitation provision. I would assume the subcommittee would not propose abolishing that offense. If my assumption is correct, the question is whether the committee believes that any clarification or amendment is called for in light of the MPC and other states' provisions. [The chair has limited expertise on this topic. Those with any experience in the area are encouraged to highlight any issues I have overlooked.]

B. The Model Penal Code Provision

Section 5.02 of the Model Penal Code addresses solicitation and is much simpler than the attempt provision. It has three subsections:

Subsection (1) DEFINES SOLICITATION, specifying the mens rea and actus reus required.
This subsection:

- requires a culpability/mens rea of *purpose* to promote or facilitate the commission of a crime
- and
- specifies the required conduct/actus reus as *commanding, encouraging, or requesting* another person to engage in conduct that would be the crime or an attempt or that would establish his complicity in the commission or in the attempted commission of the offense.

Subsection (2) addresses FAILURE TO COMMUNICATE, providing that there is no need to actually communicate with the person solicited if the conduct was *designed* to effect such communication. (In other words, commanding, encouraging, or requesting occurs whether or not the words are heard by or reach the individual being commanded, encouraged, or requested.)

Subsection (3) PROVIDES A RENUNCIATION DEFENSE to solicitation and specifies the requirements for such a defense.

C. State Law

According to my research assistants' surveys, 5 states have MPC-based solicitation statutes, 28 have statutes that differ from the MPC, and 17 have no solicitation statute. For sample statutes, see the website under "solicitation." (<http://iowacriminalcode.googlepages.com/18.htm>) The state statutes, like Iowa's, include grading schemes. (Note: As a general rule, the MPC, in section 5.05, grades solicitations to commit all but the most serious crimes *at the same level* as the crime solicited. The most serious level is reduced one grade.)

D. Iowa Law

Section 705.1 of the Iowa Code **defines SOLICITATION**:

- ◆ It includes *commanding, entreating, or otherwise attempting to persuade* another to commit a particular felony or aggravated misdemeanor.
- ◆ It requires both the "*intent* that such act be done" and "circumstances" corroborating that intent by clear and convincing evidence
- ◆ It grades solicitation of felonies as class "D" felonies and solicitations of aggravated misdemeanors as aggravated misdemeanors.
- ◆ The provision does not specifically address "uncommunicated solicitation" and no clear case law on the subject was found. One opinion does state that solicitation "is committed when the inducement is attempted," *State v. Propp*, 532 N.W.2d 784 (1995) (quoting *State v. Williams*, 315 N.W.2d 45 (1982)), which might suggest that communication is not necessary, but certainly is not a definitive holding to that effect.

Section 705.2 of the Iowa Code provides a **RENUNCIATION DEFENSE** for solicitation:

- ◆ It requires that the person who has solicited another either persuade that other person not to commit the crime or otherwise prevent the crime
- ◆ It requires a complete and voluntary renunciation, then defines those two terms.

E. Questions/Issues

As noted, we need to decide whether to amend the Iowa Code section:

1. Should "commands, entreats, or otherwise attempts to persuade " be changed to MPC language "commands, encourages, or requests" or to any of the acts specified by other state code provisions?
2. Should the Iowa Code be expanded to include soliciting a person to engage in "attempts" or conduct that would make the solicited person an accomplice?
3. Should "intent" be changed to "purpose"? And should the requirement of "corroboration of the intent by clear and convincing evidence" be retained?
4. Should the Iowa Code be expanded to include *any crimes*, not just aggravated misdemeanors and above?
5. Should the Iowa Code specifically provide for the inclusion of "uncommunicated solicitation"?
6. Should the grading scheme in 705.1 be retained?
7. Should the language of the renunciation defense be modified at all?

F. Recommendations

The chair would recommend:

1. Changing the acts to the MPC language—"commands, encourages, or requests." (We might also retain "attempts to persuade.")
2. Changing "intent" to "purpose."
3. Including a specific statement that "uncommunicated solicitation" suffices within the provision.
4. Comparison of the language of the renunciation defense to that in the MPC provisions (5.02 and 5.01) to determine whether the Iowa Code should be clarified at all.

The chair does not make a recommendation on:

1. Whether the requirement of corroboration of intent by clear and convincing evidence should be retained.
2. Whether to add soliciting "attempts" or "conduct that would establish complicity."
2. Whether the Iowa Code should be expanded to include crimes below aggravated

misdemeanors. If the provision is expanded, the grading scheme (which should be retained in the solicitation provision) will have to be amended to correspond to the expansion.

IV. CONSPIRACY

A. Issues in Conspiracy Law

Conspiracy is a well-established and widely-used, though often controversial basis for criminal liability. In light of the Iowa provision defining the crime, the only questions, once again, are whether the extant statute needs revision, amendment, or clarification. [The chair has limited expertise on this topic as well. Those with any experience in the area are again encouraged to highlight any issues I have overlooked.]

B. The Model Penal Code Provision

Section 5.03 of the Model Penal Code addresses conspiracy and deals with a number of related questions: It has seven subsections:

Subsection (1) DEFINES CONSPIRACY, specifying the mens rea and actus reus required. This subsection:

- requires a culpability/mens rea of *purpose* to promote or facilitate the commission of a crime
and
- specifies the required conduct/actus reus as (1) *agreeing* with another person/other persons that one or more will engage in conduct that constitutes a crime or an attempt or a solicitation or (2) *agreeing* to aid another person/other persons in planning or committing a crime, an attempt to commit a crime, or a solicitation to commit a crime.

Subsection (2) defines the SCOPE OF THE CONSPIRACY, providing that if a conspirator *knows* another person with whom he has in turn conspired has conspired with another/others to commit the same crime, he/she is guilty of conspiring with the latter person/persons whether or not he knows their identities.

Subsection (3) addresses conspiracies with MULTIPLE CRIMINAL OBJECTIVES, declaring that if one conspires to commit multiple crimes, there is but *one* conspiracy committed so long as the multiple crimes are the object of the same agreement or continuous conspiratorial objective.

Subsection (4) is concerned with JOINDER AND VENUE in prosecuting conspiracies and is fairly complicated and detailed.

Subsection (5) addresses the OVERT ACT requirement, stating that an overt act in pursuance of a conspiracy by one of the conspirators must be proven to establish a conspiracy to commit any crime other than a first or second degree felony.

Subsection (6) provides a RENUNCIATION DEFENSE for conspiracy similar to that provided for attempt and solicitation.

Subsection (7) specifies the DURATION OF THE CONSPIRACY for purposes of determining the application of the statute of limitations.

C. State Law

According to my research assistants' surveys, 18 states have MPC-type conspiracy statutes, 27 have statutes that differ from the MPC, and 5 have no conspiracy statute. For sample statutes, see the website under "conspiracy" (<http://iowacriminalcode.googlepages.com/19.htm>). The state statutes tend to include grading schemes. (Note: As a general rule, the MPC, in section 5.05, grades conspiracies to commit all but the most serious crimes *at the same level* as the crime that is the object of the conspiracy. The most serious level is reduced one grade.)

D. Iowa Law

Section 706.1 of the Iowa Code **defines CONSPIRACY**:

- ◆ It requires an "*intent to promote the commission of . . . an aggravated misdemeanor or felony*"
- ◆ And it includes *agreeing with another to commit the crime, attempt, or solicitation or agreeing to aid another in planning or committing the crime, attempt, or solicitation*"
- ◆ It provides that it is *not necessary* to know the identity of every conspirator
- ◆ It requires proof of "*an overt act evidencing a design to accomplish the purpose of the conspiracy by criminal means*"
- ◆ It bars conspiracy liability, however, if the other(s) involved were acting for or as agents of law enforcement in an investigation when the conspiracy was formed.

Section 706.2 of the Iowa Code—"Locus of Conspiracy"—prescribes where conspiracies are deemed committed, specifying multiple places that can qualify; it also bars prosecution more than once for a conspiracy based on the same agreement or combination.

Section 706.3 specifies the "**Penalties**" for conspiracy.

Section 706.4, entitled "**Multiple Convictions**," states that a conspiracy and the offense committed pursuant to the conspiracy are "separate and distinct," but then bars conviction and sentence for both the conspiracy and the offense.

Iowa case law prescribes some rules and standards for determining when and whether a

conspirator has **withdrawn** from involvement in a conspiracy (thereby apparently ending his liability for acts that occur thereafter). See *State v. Ross*, 573 N.W.2d 906 (1998); *State v. McCahill*, 72 Iowa 11 (1887).

E. Questions/Issues

As noted, the questions for the subcommittee are whether to modify or supplement the Iowa Code sections set out above:

1. Should "intent" be changed to "purpose" to be consistent with the proposed culpability provision?
2. Should the Iowa Code definition of conspiracy be expanded to include agreements to commit, attempt, or solicit *any crimes*, not just aggravated misdemeanors and above?
3. Should the definition be amended to provide that while it is not necessary to know the identity of other conspirators (current 706.1), one must know that one with whom he/she has conspired has conspired with another/others in order to be considered their co-conspirator (see MPC 5.03(2))?
4. Should Iowa law declare that a conspiracy to commit multiple crimes is generally one conspiracy only (see MPC 5.03(3))?
5. Should the grading scheme in 706.3 be retained?
6. Should a renunciation defense be proposed for conspiracy (as for solicitation)?
7. Are there any problems with or needs for amendment of 706.2 (locus) and 706.4 (multiple convictions)?
8. Should the Iowa Code specify the requirements for "withdrawal" from a conspiracy?
9. Should the conspiracy provision specify the substantive crimes a conspirator may be held liable for other than those which he or she has agreed to commit, attempt, or solicit?

F. Recommendations

The chair would recommend that:

1. Intent should be changed to purpose to be consistent with the proposed culpability provision.
2. A renunciation defense should be provided similar to that included in the MPC (or the Arkansas code).
3. The provision should not be amended to specify the scope of a conspirator's liability for substantive crimes beyond those agreed to.

The chair takes no position on the following issues:

1. Whether the Iowa Code definition of conspiracy should be expanded to include agreements to commit, attempt, or solicit *any crimes*, not just aggravated misdemeanors and above.
2. Whether the definition should be amended to provide that while it is not necessary to

know the identity of other conspirators, one must know (or at least reasonably expect) that one with whom he has conspired has conspired with another/others in order to be considered their co-conspirator. (See Arkansas and Colorado codes)

3. Whether the Iowa Code should declare that a conspiracy to commit multiple crimes is generally one conspiracy only as in the MPC. (See Colorado code)
4. Whether the requirements for "withdrawal" should be specified in the Code.
5. Whether the grading scheme in 706.3 should be retained.
6. Whether any changes to sections 706.2 (locus) and 706.4 (multiple convictions) are needed.